Supreme Court, U. S.
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In the
Supreme Court of the United States

October Term, 1976

No. 76-1288

R. J. WITTENBRINK and NANCY McCOY,

Petitioners,

- vs. -

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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556 P.2d 1217

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No.

R. J. WITTENBRINK and NANCY McCOY,

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- vs. -

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF COLORADO

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered on November 22, 1976 with the petition for rehearing being denied on December 27, 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is reported at 556 P.2d 1217 and is set out in the Appendix, infra at p. 7. The denial of the petition for rehearing is set out in the Appendix, infra at p. 18. The decision of the County Court of Adams County is unreported but is set out in the Appendix, infra at p. 20.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on November 22, 1976, with the petition for rehearing being denied on December 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners were denied due process of law in being tried before a judge having no tenure and no protection from removal without cause?

2. Whether petitioners were denied equal protection of the law in being tried before a non-tenured judge in a home-rule city while judges in statutory cities and state courts have tenure?

STATUTORY PROVISIONS INVOLVED

Section 6.2, City Charter of the City of Thornton, Colorado

> "The Municipal Court shall be presided over and its functions exercised by one or more judges, who are qualified electors of the State of Colorado and who are at least twenty-five (25) years of age, appointed by the Council to serve at the pleasure of the Council."

STATEMENT OF THE CASE

Petitioners received summons and complaints in early 1975 for alleged traffic violations of the City of Thornton, Colorado. Both were directed to appear before the municipal court of the City of Thornton to answer the charges against them. Though traffic charges, each faced a possible maximum punishment of a three hundred dollar fine and ninety days in jail.

Prior to trial it was discovered that the judges of the municipal court of the City of Thornton held office at the pleasure of the city council, with no tenure for a term of

office or any set grounds for removal. Section 6.2, City Charter of the City of Thornton, Colorado. Petitioners, along with several other defendants, moved to dismiss the charges against them as the municipal judge was removable by one of the parties to the case, the City of Thornton. The municipal judge denied the motion, and after trial to the court found both petitioners guilty of the charges against them.

Appeal was taken to the County Court of Adams County where the motion to dismiss was raised de novo. Judge John Horan ruled in favor of petitioners, holding that there was a denial of due process of law in that petitioners were not given a trial before a judge having no interest in the outcome of case and in his continued employment by the City of Thornton. Respondents filed a direct appeal with the Supreme Court of the State of Colorado with Judge Horan named as defendant, but petitioners being the real parties in interest.

The Supreme Court of the State of Colorado reversed the decision of Judge Horan, with Justice Carrigan dissenting. Please note that the decision of the Supreme Court of the State of Colorado is denominated as *People v. Horan*, 556 P.2d 1217, though the petitioners were the parties in interest. The court below held the mere fact that a judge has no tenure and can be removed for cause or no cause, this is not, without further evidence of bias, a sufficient basis for claiming a denial of due process of law. The dissent took exception to the majority ruling holding that due process of law under the Fourteenth Amendment mandates a judge with real independence that can only be provided through tenure.

The petitioners filed a petition for rehearing before the Supreme Court of the State of Colorado which was denied on December 27, 1976. Petitioners request this Court to issue a writ of certiorari under jurisdiction granted by 28 U.S.C. 1257(3).

REASONS FOR GRANTING THE WRIT

1. Petitioners were denied due process of law in being tried before a judge having no tenure and being removable without cause.

The issue of due process of law under the Fourteenth Amendment is the right to be tried before a fact finder who is impartial. The court below stressed that the right to appoint a municipal judge was a matter of local concern, as the City of Thornton is a home-rule city pursuant to Article XX, Colorado Constitution. As such the decision below found no due process problems with allowing a home-rule municipality to appoint a municipal judge to serve at its pleasure with no tenure and no grounds for removal being specified. The court below found that "evidence of bias" would have to be shown before any due process issue would arise.

It is not disputed that the City of Thornton is a party litigant to all cases brought before its municipal court, nor is it disputed that its municipal judges are appointed to serve at the pleasure of the city council without any tenure, to be removable with or without cause at the pleasure of the council. Dissenting Justice Carrigan of the Supreme Court of the State of Colorado found this "situation is abhorrent to the concept of fundamental fairness and is so inherently likely to deprive the court of real independence as to deny litigants opposing the city the impartial tribunal required as an element of due process." *People v. Horan, supra* at p. 1221. The majority did not agree, saying that evidence of bias was necessary.

The right to an impartial hearing and trier of fact is an integral part of due process of law. *Ward v. Village of Monroeville*, 409 U.S. 389 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Withrow v. Larkin*, ____ U.S. ____, 95 S.Ct. 1456 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *In Re Murchison*, 349 U.S. 133 (1955); *Connally v. Georgia*, ____ U.S. ____, 97 S.Ct. 546 (1977). No more direct interest can affect any human being than his continued employment and income, particularly if he knows that one of the parties before him in court may terminate him at any time and for any reason or no reason at all. The court below relied upon *Palmore v. United States*, 411 U.S. 389 (1973) as standing for the proposition that there is no constitutional right to a trial

before a tenured judge, and petitioners believe that this is a misreading of the *Palmore* decision. As the dissent below so eloquently states, independence of the judiciary is an integral part of the American system of government and is essential at all court levels.

There is no claim by petitioners that life-time tenure is required for due process, but that there must be some independence insured by tenure and removal only for cause. Due process cannot be maintained in light of the standard set forth in the cases cited above when a party litigant can hire a judge to sit at its pleasure, removable at any time, with or without reason, and expect that the fine balance between city and accused may be maintained.

2. Petitioners were denied equal protection of the law in being tried before a non-tenured judge.

The decision of the court below found that no equal protection problem existed, as there was no finding that a trial before a non-tenured judge was unfair. This begs the issue, and places all courts of home-rule municipalities into a separate and apart category from all other courts within the State of Colorado.

The court below found that home-rule cities have a local concern in how they select their municipal judges. Yet for a city or town organized under statute, not under home-rule charter, its municipal judge must have a term of at least two years and can be removed only for cause. C.R.S. 13-10-105 (1973). All state judges, including justices of the Supreme Court of the State of Colorado, have tenure and can only be removed for cause. See Article VI, Colorado Constitution; C.R.S. 13-7-205 (1973); C.R.S. 13-7-105 (1973). Petitioners were denied the right to trial before a tenured judge only because they received their summons within the city limits of the City of Thornton. Had they received the same identical charge outside the city limits, their trials would have been before a judge having tenure of at least two years and being removable only for cause during his or her term.

CONCLUSION

Petitioners were denied equal protection of the law. There is no rational basis for allowing a trial before a tenured judge outside the city limits of Thornton, while denying the same within for the same identical charge.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF
COLORADO

No. 27240

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Petitioners,

v.

HONORABLE JOHN F. HORAN, COUNTY JUDGE, COUNTY COURT OF ADAMS COUNTY,

Respondent.

ORIGINAL PROCEEDING

EN BANC RULE MADE ABSOLUTE

Daniel, McCain & Brown

Attorneys for Petitioners

Stitt, Wittenbrink, and Roan, P.C.
Richard M. Borchers,

Attorneys for Respondent.

Joseph G. Studholme, for Amicus Curiae,
Colo. Municipal Judges Association

MR. CHIEF JUSTICE PRINGLE delivered the opinion of the court.

Nancy McCoy and R. J. Wittenbrink were cited for violating the traffic laws of the City of Thornton in early 1975. They moved to dismiss the charges on the ground that Thornton's city charter provides for judges who sit at the pleasure of the city council. The motions were denied. McCoy and Wittenbrink were subsequently found guilty by the municipal court and they appealed to the county court.

In the county court, they renewed their motion to dismiss. County Judge John Horan, the respondent here, dismissed the actions, holding: 1) that Colorado's constitutional and statutory provisions do not allow home rule cities to provide for municipal judges without tenure, and 2) that a trial before a nontenured judge violates the due process and equal protection clauses of the Colorado and United States Constitutions.

We issued a rule to show cause why the judgment of the county court should not be set aside and the actions reinstated. We now make the rule absolute.

I.

Article XX, Section 6 of the Constitution of the State of Colorado authorizes a home rule city to enact charter provisions providing for the election or appointment of the officers of municipal courts. It specifically points out that matters dealing with the creation and staffing of municipal courts are local matters. The City of Thornton had adopted a home rule charter establishing municipal courts, with its judges appointed by the city council serving at the council's pleasure. Respondent argues, however, that the Colorado legislature has statutorily required that municipal judges be tenured and that the matter is one of statewide concern. Under such circumstances, they contend, the statutes govern, rather than the charter. *See Hardamon v. Municipal Court*, 178 Colo. 271, 497 P.2d 1000 (1972); *Bennion v. City and County of Denver*, 180 Colo. 213, 504 P.2d 350 (1972); *Davis v. City and County of Denver*, 140 Colo. 30, 342 P.2d 674 (1959).

Section 13-10-105(1)(a), C.R.S. 1973, provides in relevant part:

> "*Unless otherwise provided in the charter of a home rule city*, the municipal court shall be presided over by a municipal judge who shall be appointed by the municipal governing body for a specified term of not less than two years. . . ."
> (emphasis added)

Read in context with Article XX, Section 6, it is clear that the statute's unambiguous language offers home rule cities, such as Thornton, the opportunity to specify the terms under which a municipal judge holds his office. Thornton's decision to appoint judges removable at the will of the city council is consistent with Section 105.

Moreover, it is apparent that the legislature itself recognized the power of home rule cities in this area given by the constitution when it enacted section 13-10-130, C.R.S. 1973. That section provides:

> "*Applicability*. This article shall apply to and govern the operation of municipal courts in the cities and towns of this state. *Except* for the provisions relating to the method of salary payment for municipal judges, the right to a trial by jury for petty offenses provided for in Section 16-10-109, C.R.S. 1973, rules of procedure promulgated by the supreme court, and appellate procedure, *this article may be superseded by charter or ordinance enacted by a home rule city*."
> (emphasis added)

The fact that the term of office for municipal judges is not included in the exceptions clearly indicates the legislature's recognition that the tenure decision lies in the hands of the citizens of home rule cities.

Finally, a recent action by the legislature has demonstrated that terms of office for judges that do not provide tenure are not against the public policy of the state. Section 31-4-208, C.R.S. 1973 (1975 Supp.), directs that municipal judges in statutory cities with a city manager form of government sit at the pleasure of the city council.

In the context of the discussion above, it is apparent *Hardamon v. Municipal Court, supra,* dealing with the right to jury trial in municipal courts, is inapposite.

II.

Respondent contends that even if Colorado's statutory scheme does provide for nontenured judges, such a system is violative of the due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution.

The respondent cites as authority for his position, *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267 (1972). We think that case is not authority for the proposition asserted here. There the United States Supreme Court held that a mayor-judge could not be impartial in his judicial duties since the income of the village, for which he had executive responsibility, depended upon the amount of money collected by way of fines he imposed. Of course, where the mayor-judge's personal income depends on the fines, due process is violated. *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Conversely, where a mayor-judge neither had the major executive function nor a personal pecuniary interest, there is no constitutional violation. *Dugan v. Ohio,* 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). In the present case, there is no hint that Thornton's municipal judges have a direct financial interest as in *Tumey,* nor do they act in any executive capacity as in *Ward.* The question then becomes whether a defendant has a Constitutional right to a trial before a tenured judge *absent any evidence of bias.*

The Supreme Court of the United States has had the occasion to comment on this question in *Palmore v. United States,* 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed. 2d 342 (1973). The Court held that a defendant was not deprived of due process when he was found guilty in the Superior Court for the District of Columbia before a judge without lifetime tenure even though federal district judges hearing criminal cases held lifetime tenure. Justice White compared that defendant to citizens of the fifty states who are charged in state court with violations of state law. He concluded that

"Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees". *Palmore, supra,* at 391. We find no violation of the due process clause in a trial before a nontenured judge.

Nor is respondent's equal protection claim of any validity. This court has, in the past, examined provisions which treat certain municipalities differently and has found them not to be in violation of the Equal Protection Clause. *Cf. Board of County Commissioners v. City and County of Denver,* 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed,* 372 U.S. 226, 83 S.Ct. 679, 9 L.Ed. 2d 714 (1963); *Francis v. County Court in and for the City and County of Denver,* 175 Colo. 308, 487 P.2d 375 (1971). The basic inquiry is whether the difference in treatment leads to arbitrary, irrational results. There is nothing before us in this case to show that a trial before a nontenured judge in and of itself is sufficient to taint the fairness of the trial, thereby denying due process or equal protection.

We are not unmindful of the amicus' concern that public confidence may be undermined by the fact that the municipal judge serves at the pleasure of the appointing authority. We point out, however, as we have done before, that the Constitution of the United States does not, by its guarantee of the republican form of government, guarantee the doctrine of separation of powers to the states. See *In Re Interrogatories Propounded By the Senate,* ____ Colo. ____, 536 P.2d 308 (1975), and the rather lengthy discussion of this point. As we have also pointed out previously, all the power of government in this state flows from the people as required by the republican form of government and the people of this state and the people of Thornton have authorized the present system. So long as there is no *evidence* to reflect a violation of the due process clause of the Federal Constitution, we cannot substitute our philosophy for that of the people of this state and the citizenry of Thornton.

The rule is made absolute and the respondent is directed to reinstate the actions involved here.

MR. JUSTICE ERICKSON concurs in result.

MR. JUSTICE CARRIGAN dissents.

Mr. Justice Carrigan dissenting:

I respectfully dissent as to all portions of the majority opinion dealing with constitutional issues.

I have no quarrel with the majority opinion's interpretation of the statutes and Municipal Home Rule provisions of the Colorado Constitution. However, the majority opinion does not adequately meet the fundamental constitutional issues raised by the respondent and by amicus curiae, the Colorado Municipal Judges Association.

Defendants in a Thornton Municipal Court prosecution claimed they were denied the fair and impartial tribunal essential to due process because the City, which is prosecuting them, has power to remove and replace the judge at its pleasure. They also claimed denial of equal protection because some municipal court judges are appointed for at least two-year terms, whereas others serve at the pleasure of the city which appoints them.

Respondent County Court judge found denials of both due process of law and equal protection. He ruled:

> "The Court further finds it is a matter of law that a municipal judge cannot consciously or subconsciously erase the fact that his continued position and financial interest from that position as a municipal judge rests on the daily reality that the city council may remove him for any reason or without any reason at any time in its sole discretion."

The initial inquiry is whether municipal courts are truly courts, existing as part of the judicial branch of government and exercising judicial powers, or mere city administrative agencies. If they are courts, within the judicial branch of government, they must be accorded the attributes of courts, including reasonable independence from control by non-judicial branches of government.

Municipal courts have been established by legislative enactment, C.R.S. 1973, 13-10-101, et seq. They have jurisdiction to "hear and try all alleged violations of ordinance provisions of such city or town," C.R.S. 1973, 13-10-104, and therefore, the City of Thornton is a litigant in all cases heard before the Thornton Municipal Court. "All judicial powers" are vested in the municipal judge, subject to rules promulgated by the Colorado Supreme Court. C.R.S. 1973, 13-10-112. Colorado Municipal Court Rules of Procedure have been adopted by this Court. These grants of judicial authority, together with placement of supervisory and rule-making authority in this Court, clearly demonstrate that municipal courts are, and are intended to be, not administrative agencies, but *courts*, within the judicial branch of government.

One of the attributes of every court, under familiar principles of separation of powers, is a reasonable degree of independence from control by other branches of government. *Smith v. Miller*, 153 Colo. 35, 384 P.2d 738 (1963). Unless otherwise provided by the charter of a home rule city, the statute decrees that municipal judges are to be appointed for *minimum* terms of two years. Thus the problem here presented does not affect the many municipal courts in this state where a degree of judicial independence has been provided by appointing judges for fixed terms of two years or more.

But the charter of Thornton, a home rule city, provides that municipal judges there are appointed to serve *at the pleasure* of the city council. By jurisdictional definition, the City of Thornton is always a party in any case filed in its municipal court. C.R.S. 1973, 13-10-104. Thus, one litigant before the court has the power to remove the judge if his decision should displease that litigant. No insulation whatever is provided to insure the judges' independence.[1] There are

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[1] Clearly, a statute, or state constitutional provision to the effect that members of *this* court serve "at the pleasure" of the Governor, or the General Assembly, would violate the separation of powers doctrine.

neither provisions for a fixed term of office, nor guidelines for removing the judges for cause. For example, if the city council disagrees with a judge's interpretation of a particular ordinance, it may remove him and immediately substitute a judge whose interpretation of the ordinance accords with that of a majority of the city council. Similarly, if the city council feels that the judge is imposing inadequate fines, and thus the city's revenues are suffering, he can be told to increase the fines or face immediate discharge.

In fact, a Thornton judge could be removed in the midst of trial if one of his rulings were distasteful to a majority of the city council. At any time, and as to any case, one of the litigants, the city, has the power to choose the judge who will hear the case. This situation is abhorrent to the concept of fundamental fairness and so inherently likely to deprive the court of real independence as to deny litigants opposing the city the impartial tribune required as an element of due process. *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

The majority opinion seeks to distinguish *Ward* and *Tumey* on the grounds that in *Ward* the judge occupied an executive as well as a judicial office, and in *Tumey* the judge had a direct pecuniary interest in the fines he assessed. In my view there is no difference in substance. The implicit and omnipresent threat that a Thornton judge can be removed immediately without cause hangs like the sword of Damocles above his bench as he rules on cases. The single hair by which it hangs is the "pleasure" of the city council whose attorney litigates before him.

In such a situation it is not adequate to brush off the due process argument, as the majority opinion has, by the assertion that there was no showing of actual bias of a specific municipal judge in a particular prosecution. This is not a case where it is claimed that the scheme providing that a municipal judge serve "at the pleasure" of the city council is unconstitutional in its application to a particular litigant. The claim is broader: that the scheme is unconstitutional on

its face as applied to all defendants prosecuted in such courts. Moreover, to impose a burden of proof that one show by evidence that the attitude of a particular judge was altered because he might be removed is to impose an impossible burden. We live in a real world, and courts need not close their eyes to the obvious. Indeed, if anyone knows the effect of the city's removal power, surely it is the municipal judges. The Colorado Municipal Judges Association argues, in its amicus brief:

> *"How can a judge remain neutral and detached when the performance of his duty before a party to an action, i.e., the City of Thornton, is itself judged by that same party having the power to retain or discharge the judge without justification?* As long as the City may discharge its municipal judge for reasons which may be arbitrary and capricious, *the subtle incentive to protect his position must always sit alongside the judge when he renders his decision."*

Nor can it any longer be argued that the availability of a de novo review in the county court cures the defect. In *Ward, supra,* the United States Supreme Court expressly rejected that argument, holding that a defendant is entitled to a neutral and detached judge in the first instance. This rationale is especially appropriate here where the small amounts of fines involved may tempt a litigant to accept an unjust result rather than incur the expense and loss of time required to appeal the case for a trial de novo. For many law-abiding citizens, the municipal court is their only contact with the judicial system. Therefore, it is essential to public confidence in the court system that litigants perceive municipal courts as fair, independent tribunals.

In *People v. Mullins,* 532 P.2d 736 (Colo. 1975), we addressed the question of whether due process is denied or separation of powers violated because this Court appoints the Colorado Public Defender and fixes the amount of his compensation. There we held:

> "Although the public defender is appointed by the Supreme Court, his office is afforded certain protections

> by the statute. The State Public Defender is appointed for a term of five years, can be removed only for cause, and his salary is not subject to diminution during his term of office." 532 P.2d at 739.

None of these insulating protections, thought essential to the constitutionality of the Public Defender plan, are present in the instant situation to shield the independence of Thornton's municipal judges.

It is no answer, as the majority opinion implies, that the people by state constitutional amendment have authorized the municipal court system here under attack. The supremacy clause of the United States Constitution precludes the people of this state from adopting, by state constitution, any provision which would violate the due process clause of the United States Constitution. U.S. Const. Art. VI, §2 and Amdt. XIV. See *People v. Western Union Telegraph Co.*, 70 Colo. 90, 198 Pac. 146 (1921); *People v. Max*, 70 Colo. 100, 198 Pac. 150 (1921).

Nor can the majority opinion draw any meaningful support for appointing judges to serve "at the pleasure" of the city council from its citation of *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973). That case dealt with the Superior Court for the District of Columbia, a court whose judges are appointed by the President for terms of fifteen years, during which their salaries may not be reduced. Such judges obviously have far more independence than those involved here.

As Alexander Hamilton recognized in No. 79 of the Federalist papers:[2] "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." Human nature has not changed much in the intervening two centuries.

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[2] *The Federalist* No. 79, at 107 (Dunne Ed. 1901) (A. Hamilton).

Today, in the wake of Watergate, this Court should be particularly sensitive that an independent judiciary is indispensable to preservation of freedom under our system of government. Recent history provides stark examples of what may occur when judges are rendered subservient. Willig, *The Bar in the Third Reich*, 20 The American Journal of Legal History 1 (1976).

I would hold unconstitutional as a denial of Fourteenth Amendment due process the practice of appointing judges to serve at the pleasure of the city council of the municipality which prosecutes cases in that court. Therefore, I would find it unnecessary to reach the equal protection issue.

APPENDIX B

CLERK'S OFFICE
SUPREME COURT
STATE OF COLORADO
DENVER, 80203

December 27, 1976

CASE No. 27240
The People, etc.
v.
McCoy, et al

(T9-3873
T9-3263
T9-3264)

Messrs. Daniel, McCain & Brown,
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Mr. Leonard H. McCain,
Mr. Edward A. Brown,
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Mr. Richard M. Borchers,
Attorneys and Counselors,
2325 West 72nd Avenue,
Denver, Colorado. 80221.

The Hon. Joseph G. Studholme,
President, Colorado Municipal Judges Assn.,
1455 Ammons St.,
Lakewood, Colorado. 80215.

The Hon. John F. Horan,
County Judge,
County Court of
Adams County,
Brighton, Colorado. 80601.

Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for hearing was denied.

Yours very truly,
RICHARD D. TURELLI, Clerk.
By /s/ Florence Walsh
Deputy Clerk.

P.S. A copy of an order entered in the above numbered and titled case on November 22, 1976, is enclosed.

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

The People of the State of Colorado, by and on behalf of The People of the City of Thornton,

Petitioners,

27240 v. ORIGINAL PROCEEDING

Honorable John F. Horan, County Judge, County Court of Adams County,

Respondent.

On consideration of the pleadings and briefs filed herein, it is this day ordered, adjudged and decreed that the rule to show cause heretofore issued in this cause be, and it hereby is, made absolute and the respondent is directed to reinstate the actions involved in this cause.

By the Court. En Banc. November 22, 1976.

APPENDIX C

IN THE COUNTY COURT IN AND FOR THE

COUNTY OF ADAMS

STATE OF COLORADO

Action No. T9-3873
T9-3263

THE CITY OF THORNTON, COLORADO Plaintiff, vs. ROBERT J. WITTENBRINK, Defendant.	)	FINDINGS OF FACT and CONCLUSIONS OF LAW
THE CITY OF THORNTON, COLORADO Plaintiff, vs. NANCY McCOY, Defendant.	)	

THESE MATTERS having come before the Court for hearing on the consolidated motions of the Defendants to dismiss, the Plaintiff City of Thornton, being represented by Mr. William Wallace, Attorney at Law, and the Defendants, being represented by Mr. Richard Borchers, Attorney at Law. The Court having examined the motions and briefs of counsel and the pertinent cases cited therein and having heard arguments of counsel in open court, granted the said motion and

in support of said order sets forth the following findings of fact, conclusions of law, and judgment.

These matters were originally filed in the Municipal Court of the City of Thornton, State of Colorado, alleging violations of certain traffic ordinances of said city. Trials were held in the Municipal Court and appeals from the decision of said Municipal Court were taken to the County Court in and for the County of Adams, State of Colorado.

The defendants contend that the Municipal Court of the City of Thornton did not operate in accordance with the state law in that tenure of municipal judges at the pleasure of the City Council was a denial of due process of law and equal protection. This Court agrees with defendant's contention.

The appropriate part of the city charter of the City of Thornton concerning the creation of municipal courts states in part as follows:

> "PRESIDING OFFICER – QUALIFICATION AND COMPENSATION. The Municipal Court shall be presided over and its function exercised by one or more Judges, who are qualified electors of the State of Colorado and who are at least twenty-five (25) years of age, *appointed by the Council to serve at the pleasure of the Council* - - -" (emphasis added)

Said charter does not provide for a term of office to be served by the municipal judges, nor does it contain any provisions for the removal of the municipal judges for cause. The charter permits the City Council to remove a municipal judge from office without cause and at any time in sole discretion of the City Council.

The City of Thornton is a home-rule city deriving its power from Article XX, Section 6, of the Constitution of the State of Colorado. In relation to the creation of the municipal courts the constitutional grant is found in two sections of said Article.

> "a. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates thereof;

"b. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof."

The Constitution of the State of Colorado, in Section 1 of Article VI provides as follows:

> *"Vestment of judicial power.* The judicial power of the state shall be vested in a supreme court, district courts, a probate court in the city and county of Denver, county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court, as the general assembly may, from time to time establish; provided however, that nothing herein shall be construed to restrict or diminish the powers of home rule cities and towns granted under article XX, Section 6 of this constitution to *create* municipal courts." (emphasis added)

The laws of the State of Colorado further provide for the establishment of municipal courts in statutory cities and said provisions are set forth in C.R.S. 13-10-101 (1973) as amended. C.R.S. 13-10-105 (1973) provides:

> "Unless otherwise provided in the *charter* of a home rule city, the municipal court shall be presided over by a municipal judge who shall be appointed by the municipal governing body for a specified term of not less than two years. . ."

The 1975 Colorado Legislature enacted House Bill 1089 which became effective on July 1, 1975. Said section is now incorporated and cited as C.R.S. 31-4-208, C.R.S. 1973 and provides as follows:

> *City attorney – municipal judge.* The city council shall appoint a city attorney who, upon taking office, shall be an attorney-at-law licensed to practice in the State of Colorado. The city council shall also appoint a municipal judge. Said officers shall serve at the pleasure of the city council."

This section was adopted by the legislature as a part of the revision of Title 31 of the Colorado Revised Statutes, and

this Court holds that said section does not repeal or otherwise amend the provisions of C.R.S. 13-10-101, requiring that a municipal judge serve "for not less than two years".

Numerous cases have been cited by the City in its brief, and the Court finds that these cases are readily distinguishable and are not applicable to the question presented to this Court.

The defendant in its brief has cited two cases which are pertinent to this decision and will be discussed below.

The Colorado Supreme Court has spoken on the issue of justice in municipal courts in *Hardamon v. Municipal Court in and for the City of Boulder,* ____ Colo. ____, 497 P.2d 1000 (1972). The defendant, before the municipal court, requested a jury trial on a traffic ticket. The municipal court in Boulder denied such a request claiming the matter was one of local concern under home-rule provisions and C.R.S. 39-7-30 (1963), as amended, did apply to the home-rule city municipal court. In reversing this decision, the Colorado Supreme Court said:

> "We agree with this declaration (jury trial of statewide concern) and observe that a uniform system of justice throughout all of the courts of the State of Colorado, including municipal and police courts, is of paramount importance to all citizens of the state, and tends to promote the achievement of the ideal of equality of justice as expressed in our constitution. We would consider it to be destructive of the concept of equality of justice to grant or deny jury trials in petty offenses merely on the basis of where the offense occurred or in what court the guilt or innocence is to be determined. It is illogical and without reason to say that a defendant charged in a state or non-home rule municipal court should be permitted a jury trial, whereas if he is similarly charged in a home rule court he should be denied a jury trial."

To this Court it would appear that the equality of justice would require tenure and independence of the judiciary, no

matter what court is involved and no matter what label is being applied, be it a home-rule or non home-rule.

The United States Supreme Court has had occasion to deal with the lack of impartiality of judges who have an interest in the outcome of a case. A direct financial interest in the outcome of a case will render the judge less impartial. *Tumey v. Ohio*, 273 U.S. 510 (1927). This interest need not be direct, but also can involve other substantial interests.

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the municipal judge was also the mayor, and as the city's chief executive he was not unaware of the income derived from the fines of the court. In finding that there was a denial of Due Process of Law under the Fourteenth Amendment, the Supreme Court also rejected arguments of change of judge and trial de novo on appeal.

> "Respondent also argues that any unfairness can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance.*" (emphasis added)

This Court finds that the case of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and the principles stated therein set forth the basic constitutional principle that the defendant is entitled to a neutral and detached judge in the first instance when tried, and the Court further finds it is a matter of law that this principle is denied by the City of Thornton in having its municipal judges sit at the pleasure of the city council.

The Court further finds it is a matter of law that a municipal judge cannot consciously or subconsciously erase the fact that his continued position and financial interest

from that position as a municipal judge rests on the daily reality that the city council may remove him for any reason or without reason at any time in its sole discretion. It is clear from *Ward v. the Village of Monroeville* that a defendant is entitled to be tried before a judge who has no incentive to convict no matter how subtle that incentive may be.

The Court also finds that *Ward v. the Village of Monroeville* requires that a defendant be entitled to a fair and impartial judge to try his case in the first instance and not before a judge having tenure on trial de novo appeal.

This Court, in the instant case and in light of the issues presented, is not required to take evidence of any impropriety in the instant cases upon the part of the municipal judge but may rely on the wording of the charter provision as same is applied to the principle of due process of law.

The Court further finds that the powers granted to the people of the City of Thornton under the provisions of Article XX of the Constitution of the State of Colorado to create police courts and municipal courts is limited to the creation of said courts and does not grant to the people of said city the power to deny due process and equal protection to the citizens who came before the municipal court.

IT IS HEREBY ORDERED for the above reasons that the respective motions to dismiss filed by the defendants herein is hereby granted.

Signed this 10th day of May, 1976, Nunc pro tunc.

January 25, 1976.

By the Court

John F. Horan
County Judge

Supreme Court, U. S.
FILED
MAY 24 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

—o—

Action No. 76-1288

—o—

R. J. WITTENBRINK and NANCY McCOY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Respondents.

—o—

RESPONSE IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

—o—

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In The

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Action No. 76-1288

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R. J. WITTENBRINK and NANCY McCOY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Respondents.

—o—

RESPONSE IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

—o—

Respondents pray that a Writ of Certiorari be denied to review the judgment of the Supreme Court of the State of Colorado entered on November 22, 1976.

—o—

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado in this case is reported at 556 P. 2d 1217 and is set out in the Appendix of the Petition for Writ of Certiorari of the Petitioners at page 7.

———o———

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on November 22, 1976, with the petition for rehearing being denied on December 27, 1976. The Petitioners are invoking the jurisdiction of this Court under 28 U. S. C. 1257 (3), wherein the validity of Section 6-2 of the Home Rule Charter of the City of Thornton, Colorado, is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

———o———

STATUTORY PROVISIONS INVOLVED

Section 6-2, City Charter of the City of Thornton, Colorado,

> "The Municipal Court shall be presided over and the functions exercised by one or more judges, who are qualified electors of the State of Colorado and who are at least twenty-five (25) years of age, appointed by the Council to serve at the pleasure of the Council."

Section 13-10-103, C. R. S. 1973, Volume 6, page 81 (Municipal Courts)

> "This article shall apply to and govern the operation of municipal courts in the cities and towns of this state. Except for the provisions relating to the method of salary payment for municipal judges, the right to a jury trial for petty offenses provided for in section 16-10-109, C. R. S. 1973, rules of procedure promulgated by the Supreme Court, and appellate procedure, this article may be superceded by charter or ordinance enacted by a home rule city."

Section 13-10-105, C. R. S. 1973, Volume 6, Pages 81 and 82 (Municipal Judges)

> "Unless otherwise provided in the charter of a home rule city, a municipal court shall be presided over by a municipal judge who shall be appointed by the municipal governing body for a specified term of not less than two years. . . ."

Section 31-4-208, C. R. S. 1973, as amended, 1975 Cumulative Supplement, page 32 (Municipal Government)

> "The city council shall appoint a city attorney who upon taking office, shall be an attorney at law licensed to practice in the State of Colorado. The city council shall also appoint a municipal judge. Said officers shall serve at the pleasure of the city council."

———o———

QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioners denied due process of law in being tried before a municipal judge whose method of appointment and tenure was set by the City Charter of a home rule city, which method was authorized by State Statute?

2. Were Petitioners denied equal protection of the law in being tried before a municipal judge in a home rule city whose tenure status differed from judges in statutory cities and other state courts.

———o———

STATEMENT OF THE CASE

Petitioners McCoy and Wittenbrink received summons and complaints in early 1975 for alleged traffic violations in the City of Thornton, Colorado. The City of Thornton is a home rule city. Prior to trial, motions were made by the Petitioners to dismiss the actions on the grounds that the Thornton municipal judges were not appointed to a term of two years as allegedly specified by statute and that the Petitioners were denied equal protection of the law because at the municipal level the judges did not have specific tenure and at other levels in the state court system judges did have a specified tenure. The municipal court denied the motion to dismiss and at trial the Petitioners were convicted of the charges against them.

Appeal was taken to the County Court of Adams County. The statutory appeal procedures provide for trial de novo in the county court. The motions to dismiss were raised anew in the county court. The Petitioners were assigned to Division 1 of the Adams County Court, the Honorable John Horan presiding. Another defendant represented by the same counsel was assigned to Division 4 of the Adams County Court, the Honorable Dorothy Binder presiding. Judge Horan ruled in favor of the motion to dismiss of the Petitioners at bar (Appendix C of the Petition for Writ of Certiorari), and Judge Binder ruled in favor of the Respondent City on the identical motion by the other defendant (Appendix A herein). Judge Binder's decision was not appealed. Judge Horan's decision was appealed directly to the Supreme Court of the State of Colorado by the Respondent City. The Supreme Court ordered Judge Horan to show cause why his order dismissing the cases was not abuse of his authority and beyond his jurisdiction.

The Supreme Court of the State of Colorado reversed the decision of Judge Horan. Eight members of the Supreme Court joined in the opinion of the Court and one Justice filed a dissent (Appendix A of the Petition for Writ of Certiorari).

The Petitioners filed a petition for rehearing before the Supreme Court of the State of Colorado which was denied on December 27, 1976 (Appendix B of the Petition for Writ of Certiorari). Thereafter, Petitioners filed a Petition for Writ of Certiorari with this Court.

———o———

REASONS FOR DENYING THE WRIT

1. The Petitioners were not denied due process of law. There is no due process right for a defendant to be tried before a judge with a certain amount of tenure or subject only to removal for certain reasons of "cause".

The statutes of the State of Colorado quoted above provide the circumstances under which the Thornton municipal judges are appointed to serve at the pleasure of the

council. Title 13, Article 10, Sections 101, et seq., of the Colorado Revised Statutes of 1973 govern the operation of municipal courts in the State of Colorado. Section 13-10-103, supra, sets out the applicability of the article to municipal courts. It clearly provides that certain sections of this title cannot be changed by charter or ordinance enacted by a home rule city. One section in particular, regulating the method of payment of municipal judges, cannot be amended by city charter or ordinance. There is no language restricting the right of a home rule city to provide for tenure provisions concerning its municipal judges.

Section 13-10-105, supra, specifically provides that a charter of a home rule city can set the tenure of its municipal judge. These statutes set out guides for the operation of municipal courts and provide that certain aspects of that operation that cannot be changed by home rule charter, leaving a great number of aspects left to the discretion of the people in enacting their home rule charters. The opinion announced by the Colorado Supreme Court recognized this fact, and the Court stated:

> "The fact that the term of office for municipal judges is not included in the exceptions clearly indicates the legislatures recognition that the tenure decision lies in the hands of the citizens of home rule cities."

In its opinion the Colorado Supreme Court also relies on the recently revised Section 31-4-208 of the Colorado Revised Statutes, supra, relating to appointment of judges in statutory cities. The Court stated:

> "Finally, a recent action by the legislature has demonstrated that terms of office for judges that do not provide tenure are not against the public policy of the state. Section 31-4-208, C. R. S. 1973 (1975 Supp.), directs that municipal judges in statutory cities with a city manager form of government sit at the pleasure of the city council."

Additionally, as was noted above, Judge Binder of the Adams County Court denied an identical motion to dismiss by another defendant. Judge Binder's decision is included as Appendix "A", herein. That decision was not appealed.

The Petitioners ask this Court to "invent" a new due process right, for there is no legal doctrine, case law, nor any statute which makes it a right of a defendant to be tried before a judge with a particular tenure status. In *Palmore v. United States*, 411 U. S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973), this Court considered a constitutional challenge to the tenure status of the judges in the Superior Courts in the District of Columbia. In the opinion of the Court, Mr. Justice White stated:

> ". . . Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary. In this respect, the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 States when charged with violation of a state criminal law; *Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees.*" (Emphasis added.)

In the conclusion of that opinion this Court stated:

"Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the

> District in all cases whatsoever. Palmore was not more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment."

The Petitioners cite *Tumey v. Ohio,* 273 U.S. 510 (1927), and *Ward v. Village of Monroeville,* 409 U.S. 389 (1972), in support of their contention that there was a denial of due process. In those cases, because the mayor of the town was also the local judge, it was ruled that his direct knowledge of the financial affairs of the city and because his income depended entirely upon the fines paid by convicted defendants, there existed a breach of due process. Judge Binder considered these cases in her decision, and in that regard stated:

> "However, in *Dugan v. Ohio,* 277 U.S. 61, 72 L.Ed. 784, also involving a mayor who acted as judge but who received a stated salary, the United States Supreme Court found no deprivation of due process. In this connection it should be noted that the Thornton City Charter provides that '(the) judge shall receive a fixed salary or compensation, not dependent upon the outcome of the matters to be decided . . .'."

In addition, we offer the following comparison between the circumstances found by the court in *Tumey v. Ohio* and the Colorado law:

PROVISIONS IN VILLAGE ORDINANCE IN *TUMEY v. OHIO*	PROVISIONS IN COLORADO LAW
1. Justices were paid only out of court fees which procedure was not authorized by the Ohio State Constitution.	1. Municipal judges' salaries limited by statute to fixed annual compensation.
2. Justices' compensation was entirely dependent upon conviction.	2. Judges' compensation not related to convictions under state statutes and under Thornton City Charter.
3. No right to a jury trial existed.	3. Right to a jury trial exists in all courts in the State system, including municipal courts.
4. Limited right of appellate review confined to questions of law only.	4. Appeal from municipal court in all cases to county court level with trial de novo.

Thus, we see the greatly increased due process protections provided by the Colorado law and the clear distinguishability between the *Tumey* case, supra, and the case at bar. The distinctions are similar in *Ward v. Village of Monroeville,* supra.

To presume that the right of due process has been abridged by the mere circumstance that a judge sits at the pleasure of the appointing body, is to presume that because of this circumstance, the judge will be improperly influenced by the appointing body. Without a legal doctrine or case law or statute to support this presumption, and without facts to show the improper influence, there is no violation of due process. We must not *assume* that judicial officers will fall prey to improper political pressures. We must

not *assume* that governing bodies will attempt to exert improper political pressure on members of the judiciary. To make that assumption without any basis in law or fact, is to presume that these public officers are inherently dishonest and it is therefore necessary to structure the law to protect the public from the inherent dishonesty of these public officials.

2. The Petitioners argue that they are not afforded equal protection of the law since the tenure status of the Thornton municipal judges differs from the tenure status of judges in other parts of the State court system. The judges in each level of the Colorado state court system have different tenure status. If we accept the Petitioners' arguments regarding tenure, then these differences themselves are violations of equal protection of the law. That argument is without merit. *Unless it can be shown* that these differences substantially affect the administration of justice, they cannot be challenged on the basis of denial of equal protection of the law. The Petitioners' argument seems to be that the less "tenure" a judge enjoys the more incentive he will have to convict defendants. The Petitioners' argument is purely speculative. It is just as likely, if likely at all, that the less tenure a judge enjoys that more cases would be dismissed.

After dismissing the Petitioners' claim of violation of due process, the Colorado Supreme Court in its opinion in this case commented upon the equal protection argument by stating:

> "Nor is respondent's equal protection claim of any validity. This court has, in the past, examined provisions which treat certain municipalities differently and has found them not to be in violation of the Equal Protection Clause. *Cf. Board of County Commissioners v. City and County of Denver,* 150 Colo. 198, 372 P. 2d 152 (1962), *appeal dismissed,* 372 U. S. 226, 83 S. Ct. 679, 9 L. Ed. 2d 714 (1963); *Francis v. County Court in and for the City and County of Denver,* 175 Colo. 308, 487 P. 2d 375 (1971). The basic inquiry is whether the difference in treatment leads to arbitrary, irrational results. There is nothing before us in this case to show that a trial before a nontenured judge in and of itself is sufficient to taint the fairness of the trial, thereby denying due process or equal protection."

—o—

CONCLUSION

The method of appointment of Thornton municipal judges is supported by the Home Rule City Charter, which was adopted by a vote of the people, and is authorized by Colorado State Statutes and, as noted in the Colorado Supreme Court opinion, is not against the public policy of the State. No basis in fact is cited by the Petitioners, nor can one be cited, that prejudice exists because of the method of appointment and tenure of the Thornton municipal judges. The municipal court system, as embraced within the Colorado state court system, denies no defendant due process of law or equal protection of law. No substantial federal question is raised by Petitioners in their Writ of Certiorari to this Court, and Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

In the County Court in and for the County of Adams

STATE OF COLORADO

Criminal Action No. T9-3264

CITY OF THORNTON,

Plaintiff,

vs.

ORRIN W. BOWLING,

Defendant.

ORDER DENYING MOTION TO DISMISS

This cause came on the 21st day of January, 1976, for oral arguments on the defendant's motion to dismiss, Leonard McCain, Esq., representing the plaintiff and Richard Borchers, Esq., representing the defendant. The Court, having read the motion and the briefs and having heard arguments of counsel, took the matter under advisement and now denies said motion. As grounds therefore, the Court FINDS:

1. Defendant sought and was denied a writ of prohibition from the Colorado Supreme Court prior to proceeding to trial before the Thornton Municipal Court, thereby preserving grounds for the instant motion.

2. There is no dispute concerning the pertinent facts, i. e., the defendant was convicted of a traffic violation in the Municipal Court of Thornton, a home-rule city, by a lawyer-judge appointed by, and serving at the pleasure of, the City Council pursuant to the City Charter.

The defendant argues that his constitutional right to due process and equal protection of the law have been denied by virtue of the indefinite tenure of the municipal judge presiding at his trial. He claims that Thornton has failed to comply with state law in not specifying a term for municipal judges of at least two years and that the municipal court, therefore, lacked jurisdiction in this case.

The Court concludes as follows:

1. The City of Thornton has not violated state law, which clearly excepts home-rule cities from the two-year tenure requirements of other statutory cities.

The defendant cites no law to support his assertion that section 13-10-105 (1) (a), C. R. S. 1973 "allow(s) a home-rule city the power only to provide for the increased tenure of their municipal judge by charter provision." (Defendant's brief page 3). Such a contention would appear to be contrary to broad constitutional grants of power to home-rule cities (Article XX, Colorado Constitution) and to the unambiguous language of the statute cited above. The latter specifically states that "unless otherwise provided in the charter of a home-rule city" a municipal judge's term shall be not less than two years. Section 13-10-103, C. R. S. 1973 provides that Article 10 of Title 13 "may be superseded by charter or ordinance enacted by a home-rule city" except for the method of salary payment, the right to jury trial, rules of procedure promulgated by the supreme court and appellate procedure. The fact that such exceptions are listed, while the term of municipal judges is *not,* indicates a legislative intent to leave that decision to the voters of home-rule cities.

The reenactment of Title 31, C. R. S. 1973, effective July 1, 1975 affirms the power of home-rule cities to provide for alternative methods of carrying out municipal functions (Chapter 275, Section 1, p. 1006). Indeed, that statute specifies that in statutory cities with a city manager form of government the city council shall appoint a municipal judge who "shall serve at the pleasure of the city council" (Ibid. p. 1030).

The Court concludes that the charter provision in question does not violate statutory law. Even if the municipal judge was sitting illegally, however, his right to hold office may not be challenged in collateral proceedings (see 48 C. J. S. p. 958, Section 7).

2. The defendant's constitutional rights have not been violated because a nontenured judge presided in this matter.

The contentions that defendant's rights to due process and to equal protection of the law have been denied appear to rest on the assumption that a judge who serves at the pleasure of a city council is less likely than a tenured judge to be impartial. No evidence has been presented to establish a foundation for such allegation and cases cited by the defendant do not support the same. In fact, one of the cases cited by the defendant, *Palmore v. United States*, 411 U. S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973), contains language to the contrary. The defendant there asserted that he had been denied due process because he was tried before a judge in the District of Columbia who did not have lifetime tenure as provided by the United States Constitution. Since the judge in question *did* have tenure for 15 years, the following

quoted statements may well be considered dicta. They are, nonetheless, persuasive. On page 347 the court (Mr. Justice White), after stating that a defendant charged under the District of Columbia Code has a similar status to that of a criminal defendant in any of the 50 states, declares: "Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees." Further, on page 359, the court makes it clear that "the trial of the citizens of the various states for local crimes by judges without protection as to tenure (does not) deprive them of due process of law under the Fourteenth Amendment."

The defendant does not complain that he was denied a fair trial on grounds other than the indefinite tenure of the judge. This situation differs from cases cited by the defendant such as *Tumey v. Ohio*, 273 U. S. 510 and *Ward v. Village of Monroeville*, 409 U. S. 57. In both of those cases the mayor of the municipality also served as judge and his income depended upon fines paid by convicted defendants. Thus there was a pecuniary interest in the outcome in both cases. However, in *Dugan v. Ohio*, 277 U. S. 61, 72 L. Ed. 784, also involving a mayor who acted as judge but who received a stated salary, the United States Supreme Court found no deprivation of due process. In this connection it should be noted that the Thornton City Charter provides that "(the) judge shall receive a fixed salary or compensation, *not dependent upon the outcome of the matters to be decided* . . ." (Emphasis added.)

On the issue of equal protection of the law the defendant alleges that his "adjudication of guilt or inno-

cence rested merely on where the offense occurred and in which court the facts were to be tried." Implicit in this argument is the assumption that the defendant would have been acquitted had he been tried before a county judge or a municipal judge with two-year tenure. Without supporting evidence no such assumption will be indulged.

The Court having concluded that the allegations of the defendant's motion are not sustained,

IT IS ORDERED that the defendant's motion to dismiss be denied.

This matter is continued for trial to the court on May 7, 1976, at 2:00 P. M.

BY THE COURT:

Dorothy E. Binder
Judge

cc: Leonard McCain
Richard Borchers